STIPULATION AND ADDITION TO TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 569

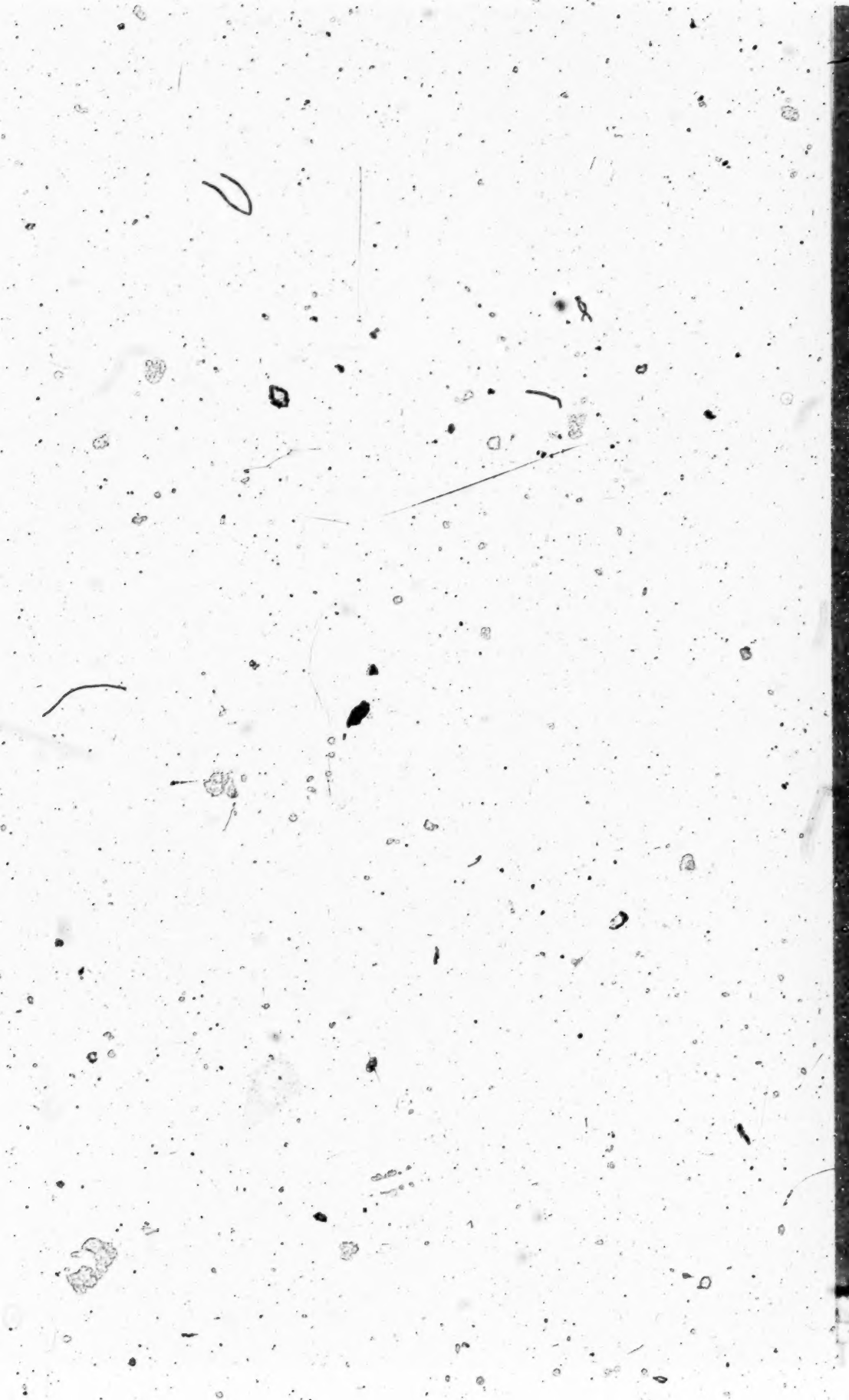
THE UNITED STATES OF AMERICA, PETITIONER

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, J. M. BERNARDIN, TRUSTEE, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 5, 1939
CERTIORARI GRANTED JANUARY 8, 1940



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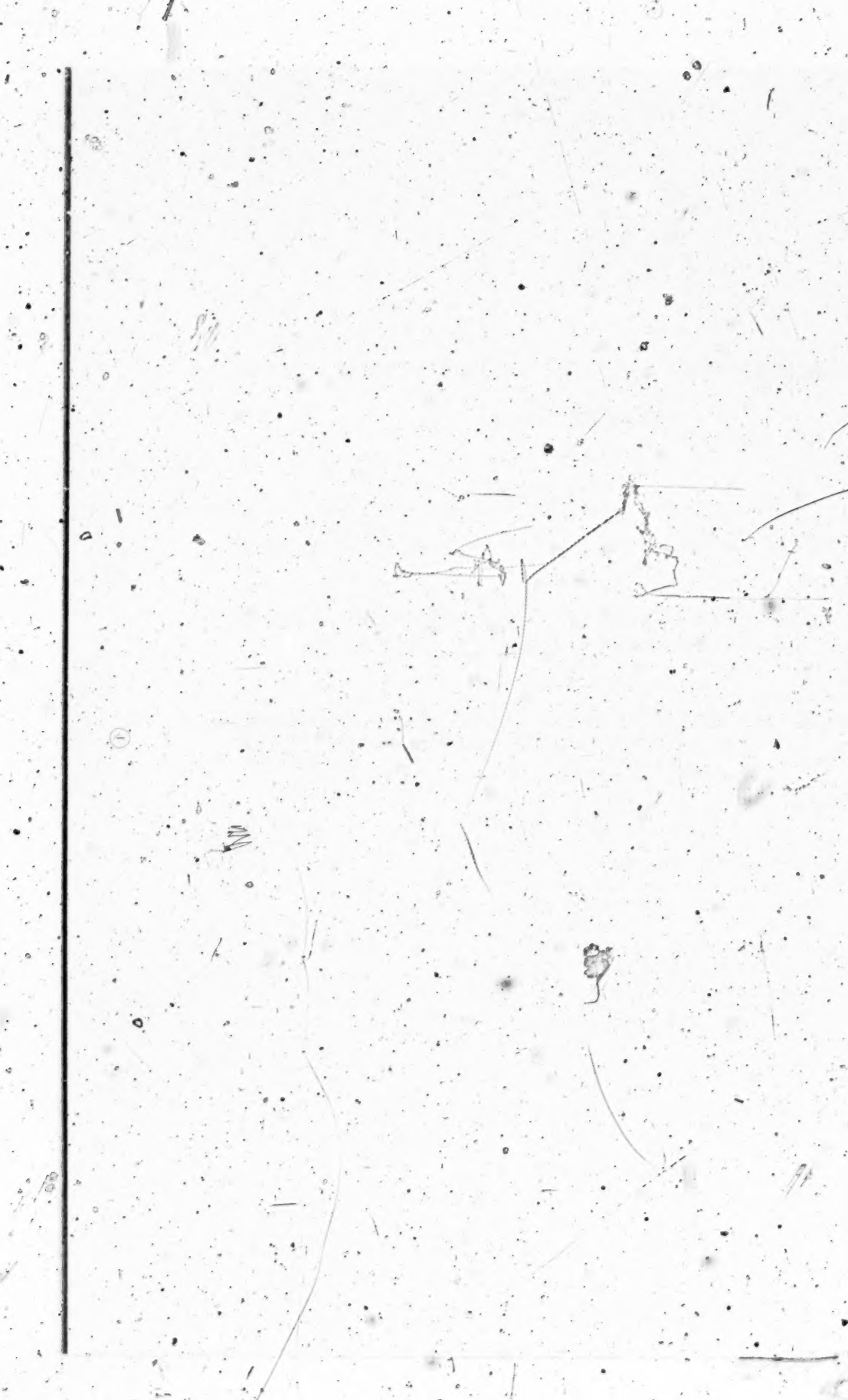

1 In Supreme Court of the United States

Petitioner No. 569

UNITED STATES OF AMERICA

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, A CORPORATION; J. M. BERNARDIN, TRUSTEE OF THE CENTRAL COAL AND COKE COMPANY; AND THE CENTRAL COAL AND COKE CORPORATION, A CORPORATION, RESPONDENTS

Stipulation

On this the 16th day of February 1940, it is stipulated by the petitioner and respondents that the attached certified copy of the transcript of the proceedings before the Honorable Eugene Rice, of the United States District Court for the Eastern District of Oklahoma, on November 23, 1937, as filed in cause No. 6451 Law, entitled United States of America versus United States Fidelity and Guaranty Company et al., and certified copy of the petition for rehearing filed in the United States Circuit Court of Appeals for the Tenth Circuit, in cause No. 1854, entitled United States of America, appellant, versus United States Fidelity and Guaranty Company et al., appellees, on November 3, 1939, shall be an addition to the record heretofore printed and filed in this case.

FRANCIS BIDDLE,
Solicitor General of The United States.

BOWER BROADDUS,
Attorney for the respondents, United States Fidelity and Guaranty Company, a corporation; J. M. Bernardin, Trustee of the Central Coal and Coke Company; and The Central Coal and Coke Corporation, a corporation.

2 In District Court of the United States for the Eastern District of Oklahoma

No. 6451 Law

UNITED STATES OF AMERICA, PLAINTIFF

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY, DEFENDANT

Record of proceedings had in the above entitled cause at Muskogee, Oklahoma, November 23, 1937, before Honorable Eugene Rice, United States District Judge.

Appearances: For the United States: Charles N. Champion, Assist. Dist. Atty; C. W. Miller, Assist. Dist. Atty. For the Choctaw Nation: W. G. Stigler, Esq. For United States Fidelity & Guaranty Co.: Broaddus & Fite.

Mr. CHAMPION. If the court please, we have entered into stipulation for most of the facts in this case. I make this brief statement as to the case. The Government brings this action against the United States Fidelity & Guaranty Company as surety upon a bond, or surety rather for a principal in a bond executed by the original lessee, who was
3 the Kansas-Texas Coal Company, I believe it is, indemnifying the fulfillment of the provisions of a coal mining lease or tribal coal mining lease executed by the Trustees and Chiefs of the Chickasaw and Choctaw Tribes or Nations of Indians in favor of the Kansas-Texas Coal Company. The property involved in this case is a part of the segregated coal lands of the Choctaw and Chickasaw Nations. There were two leases, lease No. 1 covering certain property and Lease No. 2. The leases were executed pursuant to the provisions of the Act of Congress of June 28, 1898, and the authority set out in Section 29 of that act and the rules and regulations of the Secretary of the Interior relative to the leasing of these segregated coal lands of the Choctaw and Chickasaw Tribes for developing or mining coal. The leases, as I said, were executed by the Trustee of the Choctaw Tribe and the Trustee of the Chickasaw Tribe and approved by the Secretary of the Interior on the 13th day of June 1902. The lease was for a term of thirty years. The surety company the United States Fidelity & Guaranty Company, the defendant in this action, as a part of the execution of that lease executed a bond for the sum, or in the sum of $75,000.00 payable to the plaintiff, the United States of America, and conditioned, as I stated, upon the principal fulfilling and carrying out and observing all of the obligations assumed under the terms of this coal mining lease. The claim of the Government in this case is for royalties, advance royalties, under the provisions of that lease
4 for the years 1930 and 1931. The Government also has a claim for deficit royalties in the sum of $2,800.00. I will state frankly at this time that the Government is not insisting upon its claim for deficit royalties, in view of the more recent decisions of the Circuit Court of Appeals for this circuit. The claim of the Government for the advance royalties in the sum of $2,000 under both of these leases was originally presented to the trustee—I might say this to begin with. The Central Coal & Coke Company afterwards acquired by assignment the rights under the terms of this coal mining lease. As I stated a moment ago, the original lessee was the Kansas-Texas Coal Company. They assigned to the Central Coal & Coke Company their rights under the lease. Subsequently thereto the Central Coal & Coke Company assigned to the Central Coal & Lumber Company, and thereafter by assignment the Central Lumber & Coal Company reassigned back to the Central Coal & Coke Company. We have stipulated so far as this controversy is concerned it may be considered that the Central Coal & Coke Company was at all times in possession of the lease, and for the purposes of this suit they may be considered as though they were the original lessee. The Central Coal & Coke Company filed a proceeding in the District Court of the United States in the Western Division of

Missouri for a reorganization under the provisions of the amendment to the Bankruptcy Act. An ancillary proceeding to that proceeding in Missouri was pending here in this district. The Government filed its claim for advance royalties and for deficit royalties in this ancillary proceeding pending in this district. By agreement of all parties it was agreed that the Government's claim would be considered likewise filed in the Western District of Missouri in that case, which was the original proceeding. In that proceeding in Missouri the claim of the Government against the Central Coal & Coke Company, as well as the claim of the Central Coal & Coke Company in the nature of a counterclaim or setoff against the Government was referred to a Special Master, Mr. James Gordon, in this city. A hearing was had before Mr. Gordon upon the Government's claim and counterclaim and setoff of the Central Coal & Coke Company, and findings were made by Mr. Gordon, and those findings were filed in the action. Objections were made thereto by the Government, and the Federal District Court in Missouri later approved the findings of the Special Master and rendered a judgment. The counterclaim or setoff of the Central Coal & Coke Company was for the sum of $11,090.00 and some odd cents. The Government's claim being $2,000.00. The Special Master allowed the Government's claim in the sum of $2,000. He also allowed the counterclaim of the Central Coal & Coke Company in the sum of $11,090.00 and some odd cents, which left an offset against the Government for nine thousand and some odd dollars. The judgment rendered by the District Court in Missouri approving the findings of the Special Master recited that the claim of the Government was allowed in the sum of $2,000.00; that the counterclaim and setoff of the Central Coal & Coke Company was allowed in the sum of $11,000, and then the court rendered judgment against the Government on that counterclaim for the balance of the nine thousand and some odd dollars, which was the difference between the Central Coal & Coke Company's claim and the Government's claim which was allowed. As I stated a moment ago, we have stipulated all those facts. The evidence which was introduced before the Special Master and the proceedings before him to sustain the Government's claim, as well as the counterclaim of the Central Coal & Coke Company, that evidence it has been agreed between the parties in this case would be submitted to this court and received by this court as the evidence in this case, because the evidence would be the same if we reintroduced it. The pleadings in that case in the Western District of Missouri, as well as the judgment, are all attached here and agreed upon by the parties. There is one exception here as to the stipulation. We have not stipulated the terms and conditions of the bond in this case. It so happens when I filed the original suit I did not have a copy of that bond. I learned later it had been lost, and I have since been able to obtain a copy. The rules and regulations of the Secretary of the Interior prescribe the form of the bond which was necessary to be executed in matters of this kind by the principal for the fulfillment

of the provisions and terms of the lease, and if there is no objection I would like to *to* stipulate what the conditions of this bond was.

Mr. BROADDUS. I have the form of the bond and it will be
7 agreeable to the defendant in this case and intervener to say that that form was used and executed by the principal and it with the blanks filled out made the conditions of these leases in the sum of $75,000, if that is satisfactory.

Mr. CHAMPION. Yes, sir. We would like to offer this as a form of the bond. (Government's Exhibit #1.)

Mr. BROADDUS. I would like to offer a certified copy of the order authorizing the trustees to intervene in this case. (Defendant's Exhibit #1.)

Mr. CHAMPION. It is the contention of the Government in this case that the judgment rendered by the District Court, Western Division of the Western District of Missouri is void. We say that that court was without authority, without jurisdiction to render that judgment. And mind you that that judgment, as I stated a moment ago, allows a counterclaim or set-off in favor of the Central Coal & Coke Company against the Government. It is our contention that the reason that the court had no jurisdiction and was without authority to render that judgment was because the record in that case—the record includes the proceedings and all evidence that was introduced both before the Special Master and the court—the record as I say does not show in any way, fails to show that a claim was presented by the Central Coal & Coke Company to the General Accounting Office of the United States and by that department disallowed, and for that reason under a statute of the United States it is our contention that that court was without jurisdiction to render that judgment. The judgment itself is void. The court had no authority in other words to render a judgment against the United States on a counterclaim.

The COURT. How about jurisdiction to deny the claim for $2,000?

Mr. CHAMPION. It had jurisdiction I think to do that. But in allowing our claim for $2,000 the court rendered judgment but it allowed the counterclaim of the Central Coal and Coke Company for $11,000 and rendered judgment against the Government for the difference for nine thousand and some odd dollars. We say that the judgment of that court in favor of the Central Coal & Coke Company on its counterclaim for the full amount is void, and that the court had no authority to render that. I think the facts will simmer down to this, if the court holds that that judgment as entered is a valid judgment that is the end of the law suit, because they plead that judgment. The surety in this case and the intervener, which succeeded the Central Coal & Coke Company, plead that judgment as a bar to the right by us to recover in this action against the surety. If the court holds that judgment is valid that is the end of the law suit. On the other hand, if the court holds the judgment is void then we think we are entitled to recover against the surety for the sum of $2,000. This further point. After that judgment had been rendered by the Federal Court

in Missouri the trustee of the Central Coal & Coke Company, or rather the successor of the Central Coal & Coke Company which is known as the Central Coal & Coke Corporation, its trustee filed with
9 the General Accounting Office a claim, the very claim that the Central Coal & Coke Company presented in that proceeding. That was after that judgment had been rendered. The General Accounting Office disallowed their claim. That is plead in this action and it has been stipulated for the purpose of argument that they did present their claim after the judgment, eight or ten months after the judgment had been rendered in Missouri. It is our contention that the fact that they afterwards presented their claim that that is of no avail to them in this suit because they are relying entirely upon that judgment. We say by reason of the fact that they didn't present their claim before that judgment was rendered that that judgment is void. At this time we would like to object, and we have reserved in the stipulation the right to object, to the relevancy of that testimony. At this time the government does object to the evidence as to the presentation of the counterclaim by the Central Coal & Coke Corporation, successor to the Central Coal & Coke Company, to the General Accounting Office, for the reason that it is incompetent, irrelevant, and immaterial, and bears upon no issue in this case.

The COURT. That was presented after the judgment.

Mr. CHAMPION. After the judgment; yes, sir.

Mr. BROADDUS. Right there, your honor, I want to *to* say that is not offered for the purpose of affecting that prior judgment. After they raised the question of validity that claim was filed. It is offered for this purpose; we contend of course first the statute relied
10 upon has no application and the judgment is valid. But if it isn't valid we then have made a premise for judgment here upon the same thing we had up there. If your honor holds the judgment is valid there is no need of going into that.

Mr. CHAMPION. Of course it is our contention in the event the court holds this judgment is void, since this is a suit solely against the surety, that they are not entitled to proceed in this case for judgment upon their counterclaim. That neither the surety nor the intervener prays for judgment upon its counterclaim, but solely relies upon the validity of the judgment of the District Court of Missouri and pleads that judgment as a bar.

The COURT. It will be admitted to be considered upon the entire case. I will let it be admitted.

Mr. CHAMPION. Now, if the court please, with that brief statement I would like for the court to consider this judgment. That is a certified copy of the judgment rendered in the District Court of Missouri.

Mr. BROADDUS. I think he has covered the facts with the exception of one thing. My contention is this, your honor, that this suit is covered by special act of Congress authorizing suit by the Choctaw-Chickasaw Tribe for the allowing of counterclaims; that this is not a

claim against the Government under the statute upon which he relies, but is a claim against the Choctaw and Chickasaw Tribe. It is not an action by the Government for the Government under which the Government has any pecuniary interest whatsoever. The purpose
11 of the statute upon which he relies is to protect the government and is limited to the government. But this suit is brought under authorization of the Secretary of the Interior under Act of Congress authorizing the Secretary of the Interior to bring suit in the name of the United States and to wind up the affairs and recover judgment in behalf of the tribe. That same act provides counterclaims of the defendant may be heard in that action. And so I say this statute has no application and I think is clearly shown by the authorities. With reference to the other position of counsel the direct evidence is all here. If this was a matter of original hearing your honor would still have jurisdiction to determine which party should prevail and fix the amount. We have the same evidence here and it may be used. I might say in passing, Judge Gordon was perhaps the best informed man on royalties and coal in this section of the country. He formerly lived at McAlester and died just a short while back. Both he and Judge Reeves stated that under these facts which are before your honor we were entitled to the offset. Now he says the interveners have set up that judgment. They have also set up in their intervention, and also the surety company, that those facts are the facts in defense of this claim without regard to the judgment. And the surety company has gone one step further and stipulated that the intervener in this case is insolvent and, therefore, we have no remedy and under the Tenth Circuit Court without the intervener being in here the surety would have the right to raise the question.

12 The COURT. You contend the action of the United States Government is for and on behalf of the tribe?

Mr. BRAADDUS. They show that in their petition.

Mr. BROADDUS. They show that in their petition.

Mr. CHAMPION. We make this contention of course that the money which we claim as due was due the United States, and that the United States in prosecuting this claim did so in its governmental function and by virtue of the enforcement of the business policy established for the benefit of the Choctaw and Chickasaw Tribes of Indians; and that the members of the tribes themselves are not the real parties in interest, but that the Government has a pecuniary interest by virtue of its guardianship over the tribe for whom it brings this action. I have authorities here on that.

The COURT. Let me ask you this question. You have probably covered it. The judgment you complain about was entered in the Western Division of the Western District of Missouri in the bankruptcy proceeding of the Central Coal & Coke Company, a corporation?

Mr. CHAMPION. Yes, sir; that is correct.

The COURT. You filed a claim for $2,000?

Mr. CHAMPION. Filed originally $4,000, two thousand dollars of which was allowed as advanced royalties.

The COURT. You filed your claim in that proceeding?

Mr. CHAMPION. Yes, sir. Then the Central Coal & Coke Company filed its answer and set up its counterclaim against the government and the tribe for $11,090.

13 The COURT. You claim their counterclaim was void?

Mr. CHAMPION. We claim that the court had no authority or jurisdiction to render judgment against the government upon their counterclaim.

The COURT. Did they have authority to consider the counterclaim to the extent it would defeat your claim?

Mr. CHAMPION. No, sir; we say the court had no authority or jurisdiction to do that.

The COURT. In other words you say allowing your claim is valid but allowing their counterclaim is void.

Mr. CHAMPION. As against the Government; yes, sir.

The COURT. And you now have a valid claim.

Mr. CHAMPION. Yes, sir. However, we are suing the surety for the $2,000 royalty. That is the amount we claim. We sued for $4,800.00, but as I stated we are not insisting on the claim for deficit royalties in the sum of $2,800.00. This suit here is solely a suit against the surety. The principal was in bankruptcy at the time this action was filed and since this suit was filed the successor of the Central Coal & Coke Company, by permission of court, has intervened in this action.

Mr. BROADDUS. You are mistaken about that. The trustee of the Central Coal & Coke Company appears here as the original party to that suit, and also the reorganized company, so if there is any interest outstanding they are both here.

Mr. CHAMBION. They have appeared as intervener. In our

14 answer we pray that their intervening petition be dismissed, for the reason they don't set up facts sufficient to constitute a cause of action against the plaintiff in this case; and for the further reason that the record in the bankruptcy case in Missouri is apparent on its face that court had no jurisdiction to render that judgment. They can't come in this action and set that action up as a bar to the right of the Government to recover in this case. That is purely a question of law. This further statement, in answer to counsel's statement with reference to the evidence and the records and proceedings, which we have agreed upon and stipulated in this case. That is the record and proceedings before the Special Master in the bankruptcy case in Missouri. We contend that that evidence and those proceedings and the record in that case is considered in this case for the purpose of showing that nowhere in that record, nowhere in that proceeding, will it appear that the Central Coal & Coke Company ever presented its claim to the General Accounting Office and any action was taken.

Mr. BROADDUS. We admit that they did not. We say they didn't have to.

(Argument was then heard by the court.)

15 UNITED STATES OF AMERICA,
Eastern District of Oklahoma, ss.

I, Chas. T. Diffendaffer, Official Stenographer within and for the Eastern District of Oklahoma, hereby certify that I reported in shorthand the proceedings had at the trial of the above-entitled cause; that the above and foregoing is a full, true, and correct transcript of my stenographic notes; that the above and foregoing is all the proceedings reported by me and that the balance of the record was introduced by written stipulation of the parties.

Feb. 12, 1940.

(Signed) CHAS. T. DIFFENDAFFER,
Official Stenographer.

[Clerk's certificate to foregoing paper omitted in printing.]

17 [File endorsement omitted.]

19 In United States Circuit Court of Appeals for the Tenth Circuit

No. 1854

UNITED STATES OF AMERICA, APPELLANT

v.

UNITED STATES FIDELITY AND GUARANTY COMPANY, A CORPORATION; J. M. BERNARDIN, TRUSTEE OF THE CENTRAL COAL AND COKE COMPANY; AND THE CENTRAL COAL AND COKE CORPORATION, A CORPORATION, APPELLEES

Appeal from the District Court of the United States for the Eastern District of Oklahoma

Petition of the United States for rehearing and brief in support thereof

Petition for rehearing

Filed Nov. 3, 1939

To the Honorable Judges of the United States Circuit Court of Appeals for the Tenth Circuit:

Comes now the United States of America, appellant in the above-entitled cause, and presents this petition for a rehearing on two ques-

tions: (1) whether the action of the District Court for the Western District of Missouri in fixing the balance due on the counterclaim at $9,060.90 was binding on the court below; and (2) whether the court below had jurisdiction to render an affirmative judgment in favor of the interveners.

20 In the opinion already rendered this Court has held that the United States is a "real party" whenever it brings suit to protect the rights of its Indian wards; that "the Choctaw and Chickasaw Nations are sovereigns immune to civil suit except when expressly authorized"; that it was unnecessary to determine whether the court in Missouri had jurisdiction to render an affirmative judgment against the Indians Nations because no such judgment was rendered; that "the judgment of the court in Missouri merely adjudicated the respective amounts due on the claim and the counterclaim, applied sufficient of that due on the counterclaim to offset in full the claim, and fixed the balance due on the counterclaim as against the Indian Nations at $9,060.90, to be secured and collected in the manner provided by law"; and that "the effect of the judgment was that the United States take nothing and that Central Coal and Coke Company go hence without day." With these holdings the Government has no quarrel. But in concluding that the foregoing balance could not be reexamined in a court possessing jurisdiction to render moneyed judgments against the Choctaw and Chickasaw Nations,[1] this Court inadvertently failed to recognize the full import of certain precedents:

"1. The Court did not recognize the full import of United States v. Eckford, 6 Wall. 484 (1867), wherein a judgment of the Court of Claims giving conclusive effect to a similar 'adjudication' was reversed by the United States Supreme Court.

"2. The decision of the Court of Claims in Adams v. United States, 3 C. Cls. 312 (1868), is in direct conflict with the decision in the instant case."

21 In its original brief the Government relied upon the well-recognized doctrine that no affirmative judgment could be rendered against a sovereign without its consent. Since the court in Missouri had no jurisdiction to render an affirmative judgment (and, as this Court found, did not in fact render such a judgment), it was believed unnecessary to cite authorities for the proposition that the court's finding as to the balance due could not have the force of a judgment. But inasmuch as this Court has given to that finding the same sanctity as a judgment, in an opinion in which the foregoing authorities were not analyzed, the petitioner respectfully requests that a rehearing be granted.

It is also believed that the question of whether the Act of 1906 conferred jurisdiction on the court in Oklahoma to render an affirmative judgment in favor of the interveners should be further examined in the light of its legislative history.

[1] See section 18 of the Act of April 26, 1906, 34 Stat. 137, 144, which is set out in the Appendix.

Wherefore, for the foregoing reasons, and because of the importance of this decision as a precedent in cross suits against the United States, the petitioner requests that a rehearing be granted.

Respectfully,

NORMAN M. LITTELL,
Assistant Attorney General,
C. R. DENNY,
VERNON L. WILKINSON,
Attorneys,
Department of Justice, Washington, D. C.

CERTIFICATE OF COUNSEL

I, Vernon L. Wilkinson, counsel for the appellant in the above-entitled cause, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay.

VERNON L. WILKINSON.

22 *Brief in support of petition*

STATEMENT

In order that the relevancy of the decisions cited in support of this petition may be fully appreciated, the facts of the instant litigation are summarized: Acting on behalf of the Choctaw and Chickasaw Nations, the United States in 1931 filed in the District Court for the Western District of Missouri a claim against the receiver of the Central Coal and Coke Company for advance and deficit royalties totaling $4,800 (R. 34–35). In 1935 the trustee, appointed pursuant to Section 77B of the Bankruptcy Act, filed an answer and a counterclaim (R. 26–28, 36–42). The special master to whom the matter was referred allowed the Government's claim to the extent of $2,000, and the company's counterclaim of $11,060.90 (R. 56–66). The court denied exceptions to the report and entered judgment that the United States in behalf of the Choctaw and Chickasaw Nations take nothing, and that the claim of the Central Coal and Coke Company be fixed as against such Nations in the sum of $9,060.90, to be secured and collected in the manner provided by law (R. 66–67). No appeal was taken from that judgment.

While the claim and counterclaim were pending in Western Missouri, the United States in its own behalf and for the Choctaw and Chickasaw Nations filed suit in the court below against the United States Fidelity and Guaranty Company as surety on the coal company's bond to recover judgment for these identical royalties

23 (R. 11–16). Leave to do so having been obtained (R. 29), the Central Coal and Coke Corporation (successor to the Central Coal and Coke Company) intervened and pleaded on its merits the same counterclaim which had been litigated in Western Missouri, and they also pleaded the judgment rendered in that court (R. 24–26).

The surety company by amended answer adopted the allegations contained in the petition in intervention (R. 16–18). By way of answer and reply, the United States pleaded that the judgment rendered in Western Missouri was void for the reason that the court was without jurisdiction to render judgment against the United States upon the counterclaim (R. 18–22).

The trial court determined that the court in Western Missouri had jurisdiction of the parties and of the subject matter of the claim and counterclaim; that the judgment rendered therein was valid and not subject to collateral attack; that it constituted a bar to the claim of the plaintiff; that for such reason judgment should be entered for the surety company; and that the interveners were entitled to an affirmative judgment against the Indian tribes in the amount determined by the court in Missouri, namely, $9,060.90 (R. 119–134).

ARGUMENT

I

For purposes of this petition it is conceded that the District Court for the Western District of Missouri had jurisdiction of the parties and of the subject matter of the claim and counterclaim; and that its judgment that the United States take nothing constituted a bar to any subsequent claims for the said royalties. But the Government does contend that the court in Western Missouri had no jurisdiction
24 to render an affirmative judgment against the United States or the Indian Nations; that no such judgment was in fact rendered (and this Court has so held); that any "determination" or "ascertainment" of the balance due was not binding on the court in Oklahoma (a court possessing special jurisdiction to render moneyed judgments against the United States), and that it was therefore error not to reexamine the counterclaim on its merits. This Court, in concluding that the balance "fixed" by the court in Missouri was binding in subsequent proceedings in Oklahoma, inadvertently failed to consider two cases which are directly in point, and which were not analyzed in the original brief because it was not anticipated that the decision would turn on the point now under discussion.

1. The Court did not recognize the full import of United States v. Eckford, 6 Wall. 484 (1867), wherein a judgment of the Court of Claims giving conclusive effect to a similar "adjudication" was reversed by the United States Supreme Court.—The facts and decision in the Eckford case may be summarized as follows: The United States in 1839 brought an action in the federal circuit court in New York to recover from a surety for the defalcation of his principal. The defendants (Eckford's executors) interposed certain set-offs. The jury found that there was due from the United States to the defendants, $20,545.59. On this verdict there was entered a judgment "that the United States of America take nothing by their said bill, and that

the defendants do go thereof without day; and that the said surviving executors are entitled to be paid the said balance so certified by the jurors aforesaid." [2]

The claim not being paid, the executors brought suit against
25 the United States in the Court of Claims, and offered the record of the circuit court in evidence. Upon these facts, the Court of Claims decided: (1) That the circuit court had jurisdiction of the subject matter of the suit, and the set-off pleaded. (2) That the finding of the jury and the determination of the court constituted, in substance and effect, a valid and binding judgment against the United States for the sum certified by the jury. (3) That such judgment could not be impeached in a collateral suit. (4) That the finding of the jury, under the circumstances stated, was conclusive, and was not subject to reexamination in any federal court. The Court of Claims, therefore, held that it was bound by the jury's finding and the judgment of the circuit court, refused to reexamine the merits of the claim, and entered a judgment against the United States for the said sum of $20,545.59.

On appeal to the Supreme Court, this judgment was reversed, sub nom. United States v. Eckford, 6 Wall. 484 (1867). The Supreme Court, in a unanimous opinion written by Mr. Justice Clifford, held that the circuit courts could not exercise jurisdiction in suits against the United States unless the claimant could bring his case within some act of Congress; that the right of set-off did not exist at common law; that the Act of March 3, 1797, permitted a defendant to interpose properly audited claims in reduction of his alleged indebtedness, even to the discharge of the entire claim of the Government, but that this act did not confer "any jurisdiction upon the court to determine that the United States is indebted to the defendant for any balance, or to render judgment in his favor for the excess of the set-off over his indebtedness as proved in the trial" (p. 489); "that to permit a de-
mand in set-off to become the foundation of a judgment would
26 be the same thing as sustaining the prosecution of a suit" (p. 490); [3] "that when the United States is plaintiff and the defendant has pleaded a set-off, which the acts of Congress have authorized him to do, no judgment can be rendered against the government, although it may be judicially ascertained that, on striking a balance of just demands, the government is indebted to the defendant in an ascertained amount" (p. 491).

In other words, the circuit court was without jurisdiction to render an affirmative judgment against the United States; and its "judicial ascertainment" of the amount due the defendant was not conclusive on the Court of Claims. That "finding" could be collaterally attacked. The contrary judgment of the Court of Claims was therefore re-

[2] See Francis R. Tillou et al., Executors of Henry Eckford v. United States, 1 C. Cls. 220 (1865).

[3] Cf. Reeside v. Walker, 11 How. 272, 290 (1850); see also H. Rept. No. 163, 28th Cong., 1st sess. (Ser. No. 445), pp. 2–5, where the House Judiciary Committee declared that a finding by the federal court in Pennsylvania of the amount due Mrs. Reeside on her cross-claim against the Government was not "binding."

versed, and the case was remanded.[4] Pursuant to that mandate, the $20,545.59 "judgment" was reexamined and subsequently reduced to $4,827.51. Tillou et al., Executors, v. United States, 6 C. Cls. 452 (1870).

The foregoing summary of the Eckford litigation brings out in clear relief its striking parallelism to the proceedings in the instant case. In each controversy the litigation was commenced by the United States, and in each case the defendants interposed certain set-offs. Each court, upon casting up the charges and credits, found that the United States was indebted to the defendants for specific
27 amounts. In each case a judgment was rendered, in substance or effect, that the United States take nothing and that the defendant go without day. In each case the defendants attempted to enforce that "judgment" in a court which had jurisdiction to render a moneyed judgment against the original plaintiff—the Court of Claims in the one case, and the district court of Oklahoma in the other. Each held that the prior "judicial ascertainment" of the amount due was conclusive and not subject to collateral attack, and entered a judgment accordingly. But in so doing, the Court of Claims committed reversible error, and the Supreme Court so held. United States v. Eckford, 6 Wall. 484 (1867). Accordingly, it is submitted that the court below also erred in refusing to reexamine the balance fixed by the court in Missouri.

2. The decision of the Court of Claims in Adams v. United States, 3 C. Cls. 312 (1868), is in direct conflict with the decision in the instant case.—The facts in the Adams case were as follows: The United States in 1852 brought suit in the federal district court in California seeking an accounting as to certain liens for storage of a steam sawmill and a restitution of the same. The case was referred to a master. In 1853 the court found that $10,360.00 was due the defendants and the payment thereof was decreed. No appeal was taken by the Government from this decree. In 1855 Adams, the assignee of the defendants in the California litigation, filed suit in the Court of Claims on said decree. He contended that the California court had jurisdiction, that the decree was *res adjudicata, and that no other evidence of his claim need be presented.* In dismissing his petition the Court of Claims said (pp. 332–333):

"The suit is founded on the decree of the district court of the United States for the northern district of California, finding due to
28 Heslep and Peck, two of the defendants in that case, the sum of $10,360.00 and decreeing that the same sum is due and payable to them, from the United States, with six percent interest from and after the first day of May 1857. Under these facts it cannot be distinguished from the case of Tillou, ex'r of Eckford, v. The United States, reported in 1 C. Cls. R., p. 220. A similar judgment of a circuit

[4] While the official report merely indicates that the case was "Reversed" the mandate of the Supreme Court reads, "And it is further ordered that this cause be and the same is hereby remanded to the said Court of Claims for further proceedings to be had therein in conformity to the opinion of this Court." A photostat of the original mandate has been filed with the Clerk of the convenience of the Court.

court of the United States rendered in favor of a defendant, upon a suit brought by the United States, and set-off pleaded under the act of 1797, was given in evidence, in that case, under objection. We held that the court had jurisdiction of the set-off. That being an indivisible claim, the finding in favor of the defendant, and the judgment entered upon it remaining unreversed, was conclusive of the indebtedness of the United States to the party. But on appeal to the Supreme Court of the United States the judgment was reversed. And it is there held that 'the extent of the authority conferred by the act of 1797 is that the defendant, when sued by the United States, may exhibit his claims for credit if they come within the prescribed conditions, *but they can only be admitted as claims for credit, and not as demands for judgment*' * * *. It is there held that "the defendant may prove his set-off or counterclaim, to an amount sufficient to discharge the whole claim of the plaintiffs, in which event he will be entitled to judgment that he go thereof without day, but the circuit court possesses no jurisdiction to render judgment for any excess of set-off over the plaintiff's claim." [Italics in the original.]

That case is directly in point here. This claim is exclusively founded upon the judgment or decree of the district court of California against the United States, in the proceedings set forth. Under the ruling cited in the Tillou case, *this was beyond the jurisdiction of the court, and to that extent void.*" [Italics supplied.]

That the Adams case presented to the Court of Claims a question identical with that presented to the district court of Oklahoma need not be labored. That the decision of this Court in the instant case is in conflict with that rendered by the Court of Claims in the Adams case and by the Supreme Court in the Eckford case is equally apparent.

In the light of these cases, it was clearly error for the court in Oklahoma to render an affirmative judgment against the Indian Tribes without examining into the merits of the balance "fixed" by the court in Missouri, a court which lacked jurisdiction to render an affirmative judgment against the United States or the Indian Nations.[6]

II

Up to this point it has been assumed that the district court in Oklahoma has jurisdiction, at the instance of an intervener, to render a moneyed judgment against the Indian Nation. This jurisdictional

[6] Reeside v. Walker, 11 How. 272, 290 (1850); De Groot v. United States, 5 Wall. 419, 431 (1866); United States v. Eckford, 6 Wall. 484, 489-491 (1867); The Siren, 7 Wall. 152, 154 (1868); Case v. Terrell, 11 Wall. 199, 201 (1870); Schaumburg v. United States, 103 U. S. 667 (1880); Schaumburg v. United States, 21 Fed. Cas. No. 12, 442 (C. C. E. D. Pa. 1878); Lee v. Kaufman, 15 Fed. Cas. No. 8191 (C. C. E. D. Va. 1879); United States v. Wickersham, 10 Fed. 505, 508 (C. C. W. D. Tenn. 1882); United States v. Nipissing Mines Co., 206 Fed. 431, 434 (C. C. A. 2, 1913); United States v. Various Articles of P. Property, etc., 11 F. Supp. 193, 194 (W. D. N. Y. 1935); Adams v. United States, 3 C. Cls. 312, 333 (1867); Peterson v. United States, 26 C. Cls. 93, 98 (1890); Gerding v. United States, 28 C. Cls. 349, 323 (1891); United States v. Warren, 12 Okla. 350, 354, 71 Pac. 685, 689 (1903); note, 106 A. L. R. 1248; cf. People v. Dennison, 84 N. Y. 272, 281 (1881).

[6] Cf. Kingdom of Roumania v. Guaranty Trust Co., 250 Fed. 341, 344 (C. C. A. 2, 1918), cert. den. 246 U. S. 663; French Republic v. Inland Nav. Co., 263 Fed. 410, 413 (E. D. Mich. 1920); Re Patterson-MacDonald Shipbuilding Co., 293 Fed. 192, 193 (C. C. A. 9, 1923), affirming 284 Fed. 281, certiorari denied sub nom. McLean v. Australia, 264 U. S. 582; Republic of France v. Pittsburgh S. E. Co., 112 Misc. 688, 184 N. Y. Supp. 280 (1920); note, 106 A. L. R. 1247.

question is particularly important in the event that the Eckford and Adams cases are construed to require a reversal of the judgment below. If the district court has such jurisdiction, then the judgment below should be reversed with directions to determine the interveners' claim on its merits; if it does not have such jurisdiction, then the judgment should be reversed with directions to dismiss the interveners' demand for affirmative relief.[7]

Further examination of the Act of April 26, 1906, 34 Stat. 137, in the light of its legislative history.—Section 18, it will be recalled, authorizes the Secretary of the Interior to bring suits on behalf of the Five Civilized Tribes in the federal courts of Oklahoma, and it allows the "party defendants" to such suits to set up and have adjudicated "any claim" they may have against those tribes. Any re-
31 sulting balance is to be paid by the Treasurer of the United States from the funds of said tribes.

But section 18 as originally drafted contained no provision authorizing private claims to be adjudicated by the courts. Instead, claims were to be presented to and settled by the Secretary of the Interior (section 11).[8] The first proposal designed to confer on the courts jurisdiction to adjudicate claims against these tribes was made by Mr. Stephens, of Texas, on the floor of the House, when he proposed the following amendment to section 18:

"Provided further, That any person or persons, firm, corporation, or company having any claim of any nature whatever against the Choctaw, Chickasaw, Creek, or Seminole tribe of Indians, respectively, may file suit before the Court of Claims of the United States at any time within ninety days after the passage of this act, and the Court of Claims of the United States at Washington is hereby given jurisdiction to entertain, try, and determine all such suits."[9]

The following debate then ensued:

"Mr. STEPHENS of Texas. The reason for that is that this section provides that the Secretary of the Interior may bring suit for these Indians against anyone who owes them money, but there is nowhere any provision that when the tribes owe money to any parties and the tribes go out of existence that you can collect the money. There may be outstanding debts. I know of none. I know of no warrants or indebtedness whatever, but it does seem to me a strange provision that the Indians are permitted to bring suit for money owing to them, and yet if they are owing anyone that person is without
32 remedy in law. It seems to me this amendment ought to be adopted in order to make this bill perfect.

[7] In its opinion the Court states that no objection was made to the filing of the petition in intervention and therefore the interveners should be treated as though they had been made parties defendants. The fact is that the application for intervention was presented informally and counsel for the Government orally objected. While no record of this objection has been preserved, evidence that the Government did not acquiesce in the intervention is found in the qualified endorsement of the court's order which reads: "O K as to form. Chas. N. Champion, Asst. U. S. Atty.—Attorney for Plaintiff" (R. 30). Furthermore, the question of the power of the court in Oklahoma to render an affirmative judgment in favor of the interveners is jurisdictional and therefore it is immaterial whether the Government objected. Chicago, R. & Q. R. Co. v. Willard, 220 U. S. 413, 419 (1911); Mitchell v. Maurer, 293 U. S. 237, 244 (1934).

[8] Section 11 of the Act of April 26, 1906, is set out in the appendix.

[9] 40 Cong. Rec., pt. 2, p. 1260 (1906).

"Mr. CURTIS.[10] Mr. Chairman, the gentleman surely does not understand this bill. Section 11 provides for the payment of all legal claims against these tribes, and provides that the Secretary of the Interior shall investigate them and pay them. The effect of this amendment would be to open up the Court of Claims to parties who have claims, who have been coming before Congress for forty years in an attempt to get into some court to prosecute old and unjust claims against the Indians. It would be an outrage upon these tribes to permit people to bring suits in the Court of Claims against them. All manner of claims could be trumped up against them under the amendment offered by the gentleman from Texas if it was adopted, and I sincerely hope it will be voted down. *We have provided amply in section 11 for the payment of every lawful claim that any citizen may have against the Five Civilized Tribes or either of them.* [Italics supplied.]

"Mr. STEPHENS of Texas. I should like to ask the gentleman why he thinks the Secretary of the Interior should pass upon these claims. Why not permit the opening of the courts to them? It would be a judicial question.

"Mr. CURTIS. The gentleman knows that for years people with old stale claims have been trying to get into the Court of Claims and mulct these Indian tribes, if they could. *We believe that the Secretary of the Interior is honest, and that he will carefully investigate every claim that is filed, and that he will render such judgment as he thinks fair and proper in the case. We think it is proper to leave it in his hands.* [Italics supplied.]

33 "Mr. STEPHENS of Texas. Why do you give the tribes the right to go into the courts? Why do you leave the courts open to them, and close the courts [to suits] against the tribes?

"Mr. CURTIS. Because there is no other way that a claim of the Indians can be collected. I hope the amendment will be voted down.

"The CHAIRMAN. The question is on the amendment offered by the gentleman from Texas [Mr. Stephens].

"The amendment was rejected."[11]

From the foregoing debate, it is obvious that the House did not intend to confer on the Court of Claims or any other court the right to entertain suits against these tribes. All claims were to be presented to and investigated by the Secretary of the Interior (section 11). He was to render such judgment as he thought fair and proper, and the matter of claims against the tribes was to be left in his hands.

On March 1, 1906, the following action was taken in the Senate:

"Mr. CLAPP [in charge of the bill]. At this time the Senator from Texas [Mr. Bailey], who is absent, asked me to present an amendment to section 18, which I will send up, authorizing a set-off to suits brought. I recommend its adoption.

"The VICE PRESIDENT. The amendment will be stated.

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[10] Mr. Curtis was in charge of the bill on the floor of the House and chairman of the committee which had reported it.

[11] 40 Cong. Rec., pt. 2, p. 1260 (1906).

"The SECRETARY. At the end of section 18, page 26, line 25, after the word 'disposition,' insert:

"'Where suit is now pending, or may hereafter be filed, in any United States court in the Indian Territory, by or on behalf of any one or more of the Five Civilized Tribes, to recover moneys
34 claimed to be due and owing to such tribe the party defendants to such suit shall have the right to set up and have adjudicated any claim it may have against such tribe, *and the same may be pleaded by such party defendants as a counterclaim or set-off;* and any *amount* [balance] that may be found due by any tribe or tribes shall be paid by the Treasurer of the United States out of any funds of such [tribe or] tribes upon the filing of the decree of the court with him.'

"The amendment was agreed to." [12]

In joint conference the bracketed words were added, and the italicized words were stricken from the foregoing amendment, and as so modified it became law.[13] From these changes it is apparent that "any claim," whether it arose out of the same transaction and whether technically a set-off or not, could be interposed and adjudicated. But inasmuch as the House had disapproved any amendment subjecting the tribes to suit by a "party plaintiff," it is fair to assume that only "party defendants" (i. e. those persons sued by the Secretary of the Interior) were to be allowed recourse to the courts. All other claims were to be determined by the Secretary of the Interior pursuant to section 11 of the act. If the district court, in the exercise of its discretion, can grant leave to intervene, and if these interveners thus become "party defendants" who may, by the terms of the act, interpose "any claim" against these tribes, then the court may thus enlarge its own jurisdiction under section 18 and to that extent cut down the jurisdiction which Congress conferred on the Secretary of the Interior by section 11.

35 Since the act allows a "party defendant" to have "any claim" against the said tribes adjudicated, whether arising out of the same transaction or not, it is submitted the words "party defendants" should be strictly construed, so as not to defeat the purpose of section 11, and so as not to subject the tribes to suits not contemplated by the act of 1906.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for rehearing should be granted.

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[12] 40 Cong. Rec., pt. 4, p. 3206 (1906).
[13] 40 Cong. Rec., pt. 4, p. 3948; pt. 6, pp. 5122, 5264.

Section 11 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, 141.

"SEC. 11. That all revenues of whatever character accruing to the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, whether before or after dissolution of the tribal governments, shall, after the approval hereof, be collected by an officer appointed by the Secretary of the Interior under rules and regulations to be prescribed by him; and he shall cause to be paid all lawful claims against said tribes which may have been contracted after July first, nineteen hundred and two, or for which warrants have been regularly issued, such payments to be made from any funds in the United States Treasury belonging to said tribes. All such claims arising before dissolution of the tribal governments shall be presented to the Secretary of the Interior within six months after such dissolution, and he shall make all rules and regulations necessary to carry this provision into effect and shall pay all expenses incident to the investigation of the validity of such claims or indebtedness out of the tribal funds: Provided, That all taxes accruing under tribal laws or regulations of the Secretary of the Interior shall be abolished from and after December thirty-first, nineteen hundred and five, but this provision shall not prevent the collection after that date nor after dissolution of the tribal government of all such taxes due up to and including December thirty-first, nineteen hundred and five, and all such taxes levied and collected after the thirty-first day of December, nineteen hundred and five, shall be refunded."

Section 18 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, 144.

"SEC. 18. That the Secretary of the Interior is hereby author-
37 ized to bring suit in the name of the United States, for the use of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, respectively, either before or after the dissolution of the tribal governments, for the collection of any moneys or recovery of any land claimed by any of said tribes, whether such claim shall arise prior to or after the dissolution of the tribal governments, and the United States courts in Indian Territory are hereby given jurisdiction to try and determine all such suits, and the Secretary of the Interior is authorized to pay from the funds of the tribe interested any costs and necessary expenses incurred in maintaining and prosecuting such suits: Provided, That proceedings to which any of said tribes is a party pending before any court or tribunal at the date of the dissolution of the tribal governments shall not be thereby abated or in anywise affected, but shall proceed to final disposition.

"Where suit is now pending, or may hereafter be filed in any United States court in the Indian Territory, by or on behalf of any one or more of the Five Civilized Tribes to recover moneys claimed to be due and owing to such tribe, the party defendants to such suit shall have

the right to set up and have adjudicated any claim it may have against such tribe; and any balance that may be found due by any tribe or tribes shall be paid by the Treasurer of the United States out of any funds of such tribe or tribes upon the filing of the decree of the court with him."

[Clerk's certificate to foregoing paper omitted in printing.]

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